Supreme Court, U.S.
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CLERK

85-393

No.

In the Supreme Court of the United States

October Term, 1985

THE STATE OF OHIO,
Petitioner,

v.

DANNY ALLEN COUNTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR PICKAWAY COUNTY, OHIO FOURTH APPELLATE DISTRICT

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I

QUESTIONS PRESENTED

1. Whether the solicited, extra judicial, post-arrest statement of a co-defendant made to a law enforcement officer in a face-off confrontation with the defendant with his consent after the giving of the warning advice mandated by Miranda v. Arizona 384 U.S. 436 wherein the defendant adopts the statement of the co-defendant that an armed robbery was planned and took place, that after the robbery a kidnapping and murder of the store clerk occurred and that he was present at all times but he denied carrying the gun or killing the victim can be repeated at defendant's trial where the co-defendant does not testify without violating defendant's right to confrontation?

2. Whether it is harmless error under the Chapman v. California 386 U.S. 18, and Harrington v. California 395 U.S. 250, stan-

dards to admit a co-defendant's statement made in the presence of the defendant and denied in part by the defendant when the part of the statement adopted and not denied by the defendant along with other evidence presented establishes defendant's guilt overwhelmingly upon an aiding and abetting theory, to wit: the defendants planned an armed robbery, obtained a shotgun, went to a carryout, one robbed the clerk at gunpoint and kidnapped him and drove him to a wooded area and murdered him, each defendant saying he was present at all times but did not carry the gun or do the actual shooting?

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PREFACE

This petition should be simultaneously considered with the petition The State of Ohio v. Willie Eugene Adkins, No. 85-1, filed on July 2, 1985.

Counsel presumed since identical issues were raised and the same Court of Appeals decided those identical issues that one petition would suffice, as was done in Isaac v. Engle, No. 80-1430.

On August 12, 1985, counsel for petitioner was requested to file separately the petitions against Adkins and Counts due to a Supreme Court Rule 19.4 concern.

Counsel was informed that the petition in 85-1 would stand for Adkins, as filed and a clerical correction would be made to show it as a Petition for a Writ of Certiorari to the Court of Appeals for Highland County, Ohio Fourth Appellate District.

Finally, it was stated that unless a

second Brief in Opposition was desired, the Brief in Opposition of Adkins and Counts filed on July 31, 1985 would be deemed the Brief in Opposition to the new Petition against Counts only.

TABLE OF AUTHORITIES

Annotations:

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In the Supreme Court of the United States

October Term, 1985

THE STATE OF OHIO,
Petitioner,

v.

DANNY ALLEN COUNTS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR PICKAWAY COUNTY, OHIO
FOURTH APPELLATE DISTRICT

Petitioner, The State of Ohio prays that a writ of certiorari issue to review the decision of the Court of Appeals for Pickaway County, Fourth Appellate District, of the state of Ohio in the above-entitled case.

OPINIONS BELOW

The Supreme Court of Ohio denied the motions of the State of Ohio to certify the record and for leave to appeal without opinion.

The decision of the Court of Appeals for Pickaway County, Fourth Appellate District, in Case No. 81CA24 (Counts) is unreported.

JURISDICTION

The decision of the Court of Appeals for Pickaway County was entered on December 27, 1984.

Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> UNITED STATES CONSTITUTION, AMENDMENT VI: In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

> and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Ohio Revised Code (Page's) Section 2923.03, Complicity:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
> (1) Solicit or procure another to commit the offense;
> (2) Aid or abet another in committing the offense;
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
>
> ...
>
> (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

STATEMENT OF THE CASE

Counts was indicted on June 19, 1981, for the offenses of Aggravated Robbery in

violation of Ohio Revised Code 2911.01, Kidnapping in violation of Ohio Revised Code 2905.01 and Aggravated Murder in violation of Ohio Revised Code 2903.01.

On August 24-28, 1981, in the Court of Common Pleas of Pickaway County, Ohio, defendant was tried to a jury and was found guilty of all three charges. Counts was sentenced to the Ohio Penitentiary for a period of not less than seven and no more than twenty-five years on the Aggravated Robbery charge and to life imprisonment on the Aggravated Murder charge. The sentences were to run consecutively. The court found the Kidnapping charge merged into the Aggravated Murder charge and did not impose sentence as to that offense.

On December 7, 1981, Counts filed a timely notice of appeal in the Court of Appeals for Pickaway County, Ohio, and raised the following Assignment of Error:

ASSIGNMENT OF ERROR NO. 2:
The trial court erred in admitting evidence of the co-defendant's extra-judicial statements at trial.

On December 5, 1984, the Court of Appeals filed its opinion and on December 11, 1984, filed an amendment to the opinion which affirmed the Aggravated Robbery conviction but reversed the Kidnapping and Aggravated Murder convictions. The court held:

> In light of the above we conclude that not only were the hearsay statements by Counts (sic,Adkins) introduced at trial inadmissable under the Rule of Evidence, they were also inadmissable as a matter of constitutional law. Such admission constituted a denial of appellant's Sixth Amendment guarantee of confrontation.

The court also found the error was not harmless under Harrington v. California, 395 U.S. 250. The judgment entry of the Court of Appeals was filed on December 27, 1984. The State of Ohio filed its Notice of Appeal to the Supreme Court on January 4, 1985, and the Supreme Court denied the motion without opinion on April 15, 1985.

STATUS OF PARTIES

Respondent remains incarcerated in the Southern Ohio Correctional Facility at Lucasville, Ohio, under his conviction of seven to twenty-five years for Aggravated Robbery. Respondent Counts is eligible for parole in September. 1985, if the reversal of the murder conviction stands.

STATEMENT OF FACTS

Defendant Adkins visited co-defendant Counts at the home of Joy Cheadle in Ashville, Ohio, where Counts gave Adkins his shotgun. Both defendants left the Cheadle residence and Counts drove Adkins to the Village Carryout on June 17, 1981 located in Ashville, Ohio. Each defendant claims the other made the statement on the way to the carryout, "We may have to waste him."

Both defendants entered the carryout without disguise even though they were known in the community. One of the defendants car-

ried the shotgun and ordered the clerk to put the cash into a bag which he did. The other defendant got liquor. The clerk was ordered at gun point to accompany the defendants when they left.

One of the defendants drove the car with the other defendant and the clerk in it. A few miles away the car was stopped at the request of one of the defendants and one of the defendants took the clerk over an embankment into the woods and shot him in the head at close range with a 12-gauge shotgun, killing him.

The other defendant remained in the car. The defendant who did the actual shooting stated "I blew half his head off." Counts drove off with Adkins in the car and Adkins disassembled the shotgun and threw the parts out of the car window. The clerk's wallet, money and jewelry, which were taken from him, were also thrown out of the car. Both def-

endants handled these items and the shotgun.

The defendants had been observed and identified by neighbors of the carryout as they entered and exited it. Joy Cheadle testified she discovered Counts' shotgun missing shortly after they left. The defendants went to the apartment of Sherri Morrow, Adkins' girlfriend, where defendant Adkins had unexplained cash in his possession. Defendant Adkins had stopped on his way from the murder scene and purchased new clothing and, when he arrived at the Morrow residence, he showered and put his new clothes on. Both defendants were apprehended shortly thereafter because witnesses picked the defendants out of mug shots, identified their car, and the Sheriff knew where they lived from prior contacts with them.

Initially, both defendants were interrogated separately. Defendant Adkins at first stated he was not in Ashville, Ohio;

then he stated he was in Ashville but he knew nothing about the robbery. He then admitted that he was with Counts and that there was a robbery, kidnapping and murder but that Counts did it all. Adkins then took the Sheriff to the scene of the murder where the body was found.

After the body was found, Counts was interrogated a second time. (Initially, Defendant Counts had stated that he was not in Ashville on the evening of the murder and that he had disposed of the shotgun two weeks before.) Upon being told that the body had been found, Counts then admitted he was in Ashville with defendant Adkins and that he gave Adkins his shotgun. He admitted they did go to the carryout but that Adkins said on the way there, "We may have to waste him." Both entered the carryout, anc Counts stated he went to the liquor rack while Adkins went to the counter with the gun and robbed the

clerk. Counts stated it was Adkins who ordered the clerk at gunpoint to the car, and it was Adkins who told Counts to stop the car and ordered the clerk over the embankment and then he heard a shot. Counts admits that both he and Adkins handled the clerk's wallet, rings, wristwatch, money, and the gun, all of which were thrown out of the car window. Counts admits going to Sherri Morrow's apartment that evening, where Adkins showered and changed clothes. Upon arrest, Counts still had his same shirt on. Only Adkins had changed clothes.

After obtaining statements from both defendants, the Pickaway County Sheriff asked Counts if he would confront Adkins, and he agreed to do so. The two defendants were brought together. Proper Miranda warnings were given. The Sheriff then went over the events one by one and each defendant commented or had the opportunity to comment.

At defendant's trial, the Pickaway County Sheriff testified as to the differences and similarities between what defendant and Adkins said during the confrontation.

ARGUMENT IN SUPPORT OF CERTIORARI

1. The solicited extra-judicial post-arrest statement of a co-defendant made to a law enforcement officer in a face-off confrontation with the defendant with his consent after the giving of the warning advice mandated by Miranda v. Arizona 384 U.S. 436 wherein the defendant adopts the statement of the co-defendant that an armed robbery was planned and took place, that after the robbery, a kidnapping and murder of the store clerk occurred and that he was present at all times but he denied carrying the gun or killing the victim can be repeated at defendant's trial where the co-defendant does not testify without violating defendant's right to confrontation.

The case of Sparf v. United States 51 U.S. 183, 39 L.Ed. 343 (1894) holds:

> 2. Where two persons are jointly indicted for murder the declarations of one of them are admissable against the other if made in the presence of the latter under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.

This authority has never been overruled. Its rationale has been followed in virtually every jurisdiction. See, generally, Annot., Admissability as against conspirator of extra judicial declarations of co-conspirator, Supreme Court Cases 1 L. Ed. 2d 1780 (1956); Admissability of inculpatory statements made in the presence of accused, and not denied or contradicted by him, 80 A.L.R. 1235 (1932), supplemented in 115 A.L.R. 1510 (1938); and Admissability of statement of co-conspirators made after termination of conspiracy and outside accused presence, 4 A.L.R. 3d 671 (1965).

The State of Ohio follows the rule set

forth in Sparf, supra.

The syllabus of Vecchio v. Ohio, 15 Ohio App. 153 (Cuyahoga Cty. 1921) states:

> 2. It is not error in a criminal prosecution to admit in evidence an alleged confession signed by a co-indictee of defendant, where the evidence shows that the statement was read to the defendant, that he admitted that it was true in almost every particular, and he voluntarily discussed it with detectives testified to examining him, it being a link in the conversation between defendant and such detectives.

The facts of that case reveal the detective was asked to relate the entire conversation and he stated that the defendant said the statement he heard was true in almost every particular and the detective further stated:

> THE WITNESS: In substance, he said that the statement was true, other than that he did not carry a revolver into the store. Just the language he used, I cannot recall.

The case of State v. Poole, 50 Ohio App. 2d 204 (Summit Cty. 1976), 362 N.E. 2d 678

(1976) in its syllabus states:

> When a person charged with a crime agrees to and acknowledges the statements of an accomplice implicating such person in the commission of the crime, the acknowledged statements become his own confession by ratification or adoption and are admissable as evidence against him.

The court went on to state, at page 206:

> The law appears to be fairly well established that where it is shown a party clearly and unambiguously agrees to and adopts statements of another, the statements to which he agrees are admissable in evidence against him. Where a defendant acknowledges statements of an accomplice, the acknowledged statement becomes his own confession by ratification or adoption. THe statement of the accomplice is not limited in evidence as hearsay of the accomplice but is admitted in evidence as a voluntary confession of the defendant through the medium of his ratification. No confrontation issue is presented here since the ratified statement is not hearsay evidence. See 2, Jones on Evidence, 476, Section 13:28 (6th Edition, Gard. rev. 1972); 4 Wigmore on Evidence, 148, Section 1075 (4th Edition, Chadbourne Rev. 1972), Compare, Commonwealth v. Cheeks (1968) 429 Pa. 89, 239 A. 2d 793; Commonwealth v. Bethea (1969)

214 Pa. 253, 251 A. 2d 721. Compare also, State v. Swinger, (1966), 5 Ohio St. 2d 151, 160 Vecchio v. State (1921) 15 Ohio App. 153.

In the case of State v. Swinger, 5 Ohio St. 2d 151 (1966), cert. denied 385 U.S. 874 87 S. Ct. 148, 17 L. Ed. 2d 101, two co-defendants confronted each other. Defendant Swinger freely admitted his participation in the events although he steadfastly denied that he delivered the beating to the deceased. Swinger claimed that Bellamy delivered the fatal beating and Bellamy contended that Swinger delivered the fatal beating. The court stated at page 159:

> (T)he record shows that Miller (a third co-defendant) was present at the time Swinger made his statements and affirmatively stated that they were essentially correct. In view of this, he purports to adopt the statements and make them his own. The voluntary confession of an accomplice made in the immediate presence of an accused is admissible against the accused even though the accomplice and the accused were under arrest if the accused ratified the confession or adopts it as his own. Whether there is such an adoption or

> ratification is a question of fact for the jury to determine after proper instructions from the court...

The court went on to discuss whether or not there was a denial of confrontation and found there was not.

Ohio Evidence Rule 801(D)(2)(b) incorporates the case law cited above.

The Court of Appeals for Pickaway County specifically addressed the federal confrontation issue under the Sixth Amendment of the United States Constitution and found it was violated. Therefore, in effect, the Fourth District Court of Appeals for the State of Ohio overruled the reasoning of Sparf.

The case of United States v. Hale, 422 U.S. 71, 45 L. Ed. 2d 99, 95 S. Ct. 2133 (1975) implies that the rationale of Sparf is still good law. Even though the defendant in Sparf was silent and the case addressed the issue of post-arrest silence, the court stated:

> Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question ...

Therefore, it appears that, under Ohio law as well as federal law, in order to avoid adopting a co-defendant's statement, the defendant is obligated to unequivocably deny its content. In the case at bar, Counts did not deny the factual accuracy of the statements. He did not dispute that the Sheriff accurately and fully repeated what was said by each defendant.

There is no definitive case law that states what happens when a defendant admits part but denies part of a co-defendant's statement made in his presence. It is not reasonable nor logical to disregard the entire statement of the defendant, at least

in regard to the part he adopts. As stated in Ohio law, this is a question of fact for the jury to determine - whether or not the denial was unequivocable so as to preclude adoption by the defendant. When each defendant only denied pulling the trigger, each, in fact, was admitting that he was an aider and abettor.

The recent case of Tennessee v. Street 471 US , 85 L.Ed. 2d 425 (1985) held the introduction of the confession of an accomplice for the nonhearsay purpose of rebutting defendant's testimony that his own confession was coercively derived from the accomplice's statement did not violate the defendant's right of confrontation. In that case, the co-defendant's statement was made outside the presence of the defendant. The accuracy of the truth determining process was not impinged upon.

In the case at bar, the defendant could

have remained silent by invoking his rights under Miranda v. Arizona and the entire confrontation could not have been mentioned under United States v. Hale 422 U.S. 71, 45 L. Ed. 2d 99, 95 S. Ct. 2133 (1975). He did not do so.

The presence of a defendant at a consentual confrontation assures the accuracy of a trial's truth seeking function. If the accuracy of the statements repeated at trial is not in question, then the confrontation clause is not violated. Cross-examination of the Sheriff afforded a sufficient protection to the defendant especially where the Sheriff repeated defendant's protestations of innocence and the defendant took the stand at trial and testified identically as to his former statement.

The Fourth District Court of Appeals for Ohio has construed the Sixth Amendment of the Constitution more restrictively than

the prior pronouncements of this Court. Therefore, one of the most useful and often used interrogation techniques has been stripped away from law enforcement officials.

The statement of co-defendant Adkins made in the presence of the defendant was not hearsay, did not violate the confrontation clause of the Sixth Amendment of the Constitution, and his murder conviction should be reinstated.

2. It is harmless error under the Chapman v. California 386 U.S. 18, and Harrington v. California 395 U.S. 250, standards to admit a co-defendant's statement made in the presence of the defendant and denied in part by the defendant when the part of the statement adopted and not denied by the defendant along with other evidence presented establishes defendant's guilt overwhelmingly upon an aiding and abetting theory, to wit: the defendants planned an armed robbery, obtained a shotgun, went to a

carryout, one robbed the clerk at gunpoint and kidnapped him and drove him to a wooded area and murdered him, each defendant saying he was present at all times but did not carry the gun or do the actual shooting.

Both defendants freely admitted prior planning, obtaining the shotgun, going to the carryout, the armed robbery, the kidnapping and the murder. The only dispute was who had the gun and who pulled the trigger. Who had the gun and who pulled the trigger were irrelevant to the offenses of Complicity in Aggravated Robbery, Kidnapping and Murder since Ohio Revised Code 2923.03 says an aider and abettor shall be prosecuted and punished as if he were a principal offender.

In the case at bar, the part of the statement defendant objected to was merely cumulative to other evidence of the accused's guilt which was overwhelming.

First, each defendant admitted being

present at all times. Joy Cheadle testified that she noticed the shotgun was missing. Witnesses identified the car and the defendants entering the carryout and exiting it. Defendant Adkins purchased new clothing and took a shower, presumably to remove the blood, brain tissues and mud from his clothing because Mr. Flowers' brains had been blown out and spattered everywhere. Liquor stolen from the carryout was found in the motor vehicle. Part of the gun was found along the route taken. Defendant Adkins showed the Sheriff where to find the body.

Upon that state of facts, any error in the introduction of that part of the co-defendant's statements not adopted and ratified by him was harmless error under Chapman v. California 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) and Harrington v. California 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969).

The Fourth District Court of Appeals

stated:

> There is in the record in this case ample independent evidence tending to establish directly and by inference that appellant was guilty of not only the aggravated robbery but also the kidnapping and murder either in the capacity of principal or as an aider and abettor. Thus, the jury might well have returned the same verdict absent the controverted hearsay.
>
> On the other hand, given the nature of the defense tendered by appellant, the hearsay was a major piece of evidence which, if accepted by the jury, totally negated and rendered worthless appellant's version of the kidnapping and murder. Under such circumstances, we are not persuaded it may be considered harmless error under the Chapman standard. Assignment of error 2 is well taken.

It is inconceivable for one to believe that a hostage taken at gunpoint to a secluded wooded area wherein one defendant had to drive and one defendant had to hold the gun, that both defendants would not be guilty of murder as an aider and abettor. Therefore, the conclusion of the Fourth District Court of Appeals is contrary to,

and violates, the harmless error standard set forth above.

This Court should find that harmless error occurred and reinstate the murder convictions.

CONCLUSION

Ever since the case of Sparf v. United States in 1894, it has been proper to face off co-defendants in a criminal case and, if one makes a full confession in the presence of the other if he does not unequivocably deny the facts stated, then it can be inferred that those facts are true. Such reasoning is equally valid when a defendant admits substantially all of the facts involved in the case, and these facts were sufficient to convict him as an aider and abettor. The confrontation clause of the Sixth Amendment of the United States Constitution is not offended by such interrogation techniques.

A statement made outside the presence of the defendant cannot be introduced if the defendant remains silent when confronted with it after Miranda warnings have been given. Such a statement can be used to impeach. It should be available as substance evidence of guilt at trial if it was made in defendant's presence and it is factually accurate.

Assuming, in arguendo, that such an interrogation technique does violate the confrontation clause of the Sixth Amendment, under the facts of the case at bar, the admission of the contested portion of the co-defendant's statement was harmless error in light of the fact that the part of the co-defendant's statement which was adopted was sufficient to convict each defendant as an aider and abettor. Even without the entire statement, each defendant's guilt was overwhelmingly proven beyond a reasonable

doubt by other competent evidence.

There appears to be a direct conflict between the decision of the Fourth District Court of Appeals and the Supreme Court of the United States as to whether or not such a procedure violates the federal confrontation clause.

The decision, which addressed only federal grounds, conflicts with Ohio Supreme Court authority construing those federal grounds.

Evidence that is admittedly factually correct and relevant to aiding and abetting should not be excluded. A defendant's admission is powerful evidence of guilt, and society should not be deprived of a valuable technique to solve crime. The results of face-off confrontations must be permitted as trial evidence.

For all the valid reasons stated

herein, certiorari should be granted.

Respectfully submitted,
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(Decided March 6, 1985)

SUPREME COURT OF OHIO

1985 TERM

STATE OF OHIO,
Appellant/Cross-Appellee,
v.
DANNY ALLEN COUNTS,
Appellee/Cross-Appellant.

Case No. 85-11

JUDGMENT ENTRY

This cause, here on appeal and cross-appeal from the Court of Appeals for Pickaway County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

COSTS: Motion Fee, $20.00, paid by R. L. Kline.

COSTS: Motion Fee, $20.00, paid by affidavit of poverty.

FRANK D. CELEBREZZE
Chief Justice

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Pickaway County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was cor-

rectly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS THEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date April 15, 1985.

James Wm. Kelly, *Clerk*
Sam F. Adkins, *Deputy*

(Filed December 27, 1984)

COURT OF APPEALS
PICKAWAY COUNTY, OHIO

(Fourth Appellate District)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
DANNY ALLEN COUNTS,
Defendant-Appellant.

Case No. 81 CA 24

JUDGMENT ENTRY

This cause came on to be heard upon the appeal on consideration of law, assignments of error, the record from the Court of Common Pleas of Pickaway County, the briefs and argument of counsel.

Upon consideration thereof, the court finds that the judgment of the trial court should be affirmed in part and reversed in part, for the reasons set forth in the opinion filed herein and made a part thereof.

It is therefore ordered by the court that the judgment of the trial court finding appellant guilty of aggravated robbery is affirmed. The judgment is reversed

and the case remanded for a new trial on the kidnapping and murder charges.

It is further ordered that a mandate be sent to the Court of Common Pleas of Pickaway County for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this judgment, with a copy of the opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by counsel, excepts.

HOMER E. ABELE
Presiding Judge

(Filed December 11, 1984)

COURT OF APPEALS
PICKAWAY COUNTY, OHIO

(Fourth Appellate District)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
DANNY ALLEN COUNTS,
Defendant-Appellant.

Case No. 81 CA 24

AMENDMENT TO OPINION

PER CURIAM:

It appearing to the court that the final paragraph of its opinion was not fully completed. The last paragraph

of the opinion reads: "Based on the foregoing the judgment of the trial court is reversed and this case is remanded for a new trial." The last paragraph of the opinion is amended to read: "Based on the foregoing the judgment of the trial court is reversed and this case is remanded for a new trial on the kidnapping and murder charges and the judgment of the trial court finding appellant guilty of aggravated robbery is affirmed.

Judgment affirmed in part and reversed in part.

(Filed December 5, 1984)

COURT OF APPEALS
PICKAWAY COUNTY, OHIO

(Fourth Appellate District)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
DANNY ALLEN COUNTS,
Defendant-Appellant.

Case No. 81 CA 24

OPINION

PER CURIAM:

This is an appeal from a judgment of the Pickaway County Court of Common Pleas finding defendant guilty of aggravated robbery and aggravated murder. We reverse and remand for a new trial.

Appellant admitted to sheriff's deputies and in open court that he participated in the armed robbery of the Village Carryout in Ashville with co-defendant John [*sic*, Willie] Adkins. He also admitted that he drove his car, containing the carryout clerk and Adkins, to an isolated spot nearby where the clerk was murdered with

a point-blank shotgun blast. He claimed, however, that the kidnapping and murder were perpetrated by Adkins alone, and that he did not intend and did not believe that Adkins would kill the clerk.

Counts makes two assignments of error, which we will address in reverse order.

> Assignment of Error 2:
> "The trial court erred in admitting evidence of the co-defendant's extra judicial statements at trial."

Counts and Adkins were tried separately. In Counts' trial, the Pickaway County Sheriff testified over objection to the contents of a statement made by Adkins, implicating appellant as the principal in both the kidnapping and murder of the clerk. (tr. pg. 210-214) The statement was, of course, hearsay. Adkins was not called as a witness, and no showing of his unavailability to testify was made, as required by Evid. R. 804(A). On this basis alone, the statement should have been excluded.

But an additional basis for exclusion of Adkins' extra-judicial statements would apply even if he were shown to be technically unavailable. Evid. R. 804(B)(3) provides that

> "A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

The federal right of confrontation under the Sixth Amendment to the U.S. Constitution requires even more. As stated in *Mattox vs. U.S.* (1895), 156 U.S. 237, the confrontation clause requires that

> ". . . in all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . ."

The clause contemplates

> ". . . a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 U.S. at 242-243.

While a face to face confrontation at trial is preferred, under certain circumstances hearsay evidence may be admissible without the presence at trial of the declarant. *Ohio vs. Roberts* (1980), 448 U.S. 56; *Barber vs. Page* (1968), 390 U.S. 719. For such exceptions to apply, there must be a showing of necessity based upon the unavailability of the witness and a showing that the hearsay sought to be introduced has special indicia of reliability. As stated in *Roberts,* supra, id. 66:

> "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

As noted earlier, there was no showing that Adkins was unavailable as a witness. Testimony of an absent witness given at a prior proceeding is admissible, but it must have been a judicial proceeding or at least a proceeding which closely approximates those surrounding a typical trial. This normally includes being presided over by a judicial officer, the declarant being under oath, representation by counsel with the right to cross-examine the declarant and a record made of the proceedings. *California vs. Green* (1970), 339 U.S. 149.

The absence of counsel at the prior hearing is itself sufficient to require exclusion of the hearsay evidence. *Pointer vs. Texas,* (1965), 380 U.S. 400. See also concurring opinion of Chief Justice Celebrezze in *State vs. Young* (1983), 5 Ohio St.3d 221, 227. The presence of Counts at the jailhouse when Adkins' statement was made is wholly insufficient to satisfy the constitutional right. Similarly, the right to cross examine the sheriff at trial is likewise insufficient because it is the credibility of Adkins which is the critical issue.

In light of the above, we conclude that not only were the hearsay statements by Counts introduced at trial wholly inadmissible under the Rules of Evidence, they were also inadmissible as a matter of constitutional law. Such admission constituted a denial of appellant's Sixth Amendment guarantee of confrontation.

Because the error was of federal constitutional dimensions, it can be deemed harmless only if the reviewing court can declare it was harmless beyond a reasonable doubt. *Chapman vs. California* (1967), 386 U.S. 17. Such determination must be based upon the appellate court's reading of the record and on what seems to the court to have been the probable impact of the inadmissible evidence upon the minds of an average juror. *Harrington vs. California* (1969), 395 U.S. 250.

There is in the record of this case ample independent evidence tending to establish that appellant was guilty of not only the aggravated robbery, but, also the kidnapping and murder, either in the capacity of principal or as an aider and abettor. Thus, the jury might well have returned the same verdict absent the controverted hearsay.

On the other hand, given the nature of the defense tendered by appellant, the hearsay was a major piece of evidence which, if accepted by the jury, totally negated and rendered worthless appellant's version of the kidnapping and murder. Under such circumstances, we are not persuaded its admission was considered harmless error under the *Chapman* standard. Assignment of error 2 is well taken.

> Assignment of error 1:
> "The trial court erred in refusing to instruct the jury on the lesser included offense of murder and involuntary manslaughter."

A criminal defendant is entitled to jury instructions on lesser included offenses if, under any reasonable view of the evidence, the trier of fact could find against the state on one or more elements of the crime charged, but still find the defendant guilty of a lesser included offense. *State vs. Scott* (1980), 61 Ohio St. 155.

But the instruction is improper if the nature of the defense negates all substantive elements of the crime charged. *State vs. Nolton* (1969), 19 Ohio St.2d 133; *State vs. Wilkins* (1980), 64 Ohio St.2d 382.

Appellant in this case was charged with aggravated murder under R.C. 2903.01(B), which provides:

> "No person shall purposely cause the death of another while committing or attempting to

commit, or while fleeing immediately after committing or attempting to commit kidnapping . . ."

His requested instruction was for murder, R.C. 2903.02, and involuntary manslaughter, R.C. 2903.04.

R.C. 2903.02 defines murder as to "purposely cause the death of another." Murder is thus a lesser included offense of aggravated murder, and the jury must be allowed to consider it if the evidence could reasonably support a finding that appellant Counts purposely caused the death of the clerk but not while committing the kidnapping. We hold that it could not. The clerk was unquestionably killed while being kidnapped. There is no conceivable sequence of events in which Counts could have shared the purpose to kill without complicity in the kidnapping. His request for instructions on murder was properly denied.

R.C. 2903.04 defines involuntary manslaughter as to "cause the death of another as a proximate result of the offender's committing or attempting to commit a felony." Involuntary manslaughter is a lesser included offense of aggravated felony murder, *State vs. Scott,* supra. The jury must be allowed to consider it if the evidence could reasonably support a finding that appellant did not purposely cause the clerk's death, but that he did commit kidnapping, and that the clerk's death was a proximate result of the kidnapping.

It is obvious that whoever shot the clerk did so purposely, and is guilty of aggravated murder. The issues appellant raises, assuming part or all of his story to be true, are: (1) could the jury have found appellant, an accomplice to a robbery, responsible for aiding and abetting in the subsequent kidnapping; (2) if so, could the jury have found that the clerk's death was a proximate

result of the kidnapping; and (3) if so, could appellant have been found not to have shared the principal's purpose to kill the victim?

If all three of these questions are answered affirmatively, appellant is entitled to an instruction on involuntary manslaughter. If any one of them is answered in the negative, however, the jury, under the *Nolton* rule, must be required to choose between aggravated murder and acquittal.

We conclude that the evidence given in this case cannot support a finding that appellant was responsible for the kidnapping without also finding him responsible for the ensuing murder.

If Counts' testimony is believed, his driving the getaway car was part of the robbery. He claims he had no free choice, or intent, in the kidnapping. He claims he disassociated himself from it and attempted to dissuade Adkins from following through with it. He claims he did not participate in the kidnapping. If the jury believed this to be true, it could not find him guilty of involuntary manslaughter under R.C. 2903.04 and could not have found the proximate cause of death was Counts committing the kidnapping.

There is, however, no evidence in the record upon which the jury could find that Counts participated in the kidnapping but did not participate in the murder. Counts' testimony is given conjunctively and not disjunctively. He says, in effect, I had no intention to commit kidnapping and murder. A jury may believe or disbelieve any part of a witness's testimony, but it may not reach illogical conclusions. If a witness testifies "I ate the pork and beans," the jury may believe he did, or did not. It cannot conclude that he ate the pork, but not the beans.

When Counts testified denying intent or complicity he was denying both the kidnapping and the murder, not one or the other. The trial court was correct in denying an instruction on involuntary manslaughter under the specific evidence in the record on appeal here. Assignment of error one is overruled.

Based on the foregoing the judgment of the trial court is reversed and this case is remanded for a new trial.

Judgment reversed & remanded.

ABELE, P.J. dissents.
STEPHENSON, J. concurs in judgment & opinion.
GREY, J. concurs in judgment & opinion.

COURT OF COMMON PLEAS
PICKAWAY COUNTY, OHIO

STATE OF OHIO,
Plaintiff,
vs.
DANNY ALLEN COUNTS,
Defendant.

Case No. 81CR 75

TRANSCRIPT OF PROCEEDINGS
(August 24-28, 1981)

Partial Testimony of Dwight E. Radcliff, Sheriff of Pickaway County, Ohio

[210] Q. O.K., after this statement was completed, what happened next?

A. Shortly after 11:38 when the statement was completed, I arranged to have John [*sic*] Willie Adkins brought to my office, and to confront Mr. Adkins and Mr. Counts with the statement that Mr. Counts had just made. Upon arriving at my office, him being brought

there, I asked Mr. Counts if he noticed the individual that was just brought in. He acknowledged he did. [211] I asked him who it was. He indicated to me, it was John Adkins. I asked Mr. Adkins, at the time, if he knew the individual setting across from him.

MR. DUMM: Objection.

Q. It was in the presence of the defendant, wasn't it?

A. That is correct.

THE COURT: Overruled.

MR. DUMM: Well, I will have no opportunity to cross examine Mr. Adkins.

THE COURT: Well, he was there. Well, overruled.

A. He indicated he did, and it was Mr. Counts. So, I proceeded, at that time, to go over the statement Mr. Counts had given, and as we went through this, in the presence of Mr. Adkins, each part was touched upon, based on the fact that starting with the incident of the gun at the home of Joy Cheadle. No denial on the ownership of the gun, however, Mr. Adkins, he had left with the gun. As far as travel from the Cheadle home to the Village Carry Out, there was no denial about that. Mr. Counts was the driver of the car. As far as arriving at the Village Carry Out, no denial about that, no denial about that the previous statement had been made by the man, it was him. We then went to the Carry Out, no denial upon entering the Carry Out.

MR. DUMM: Your Honor, once again for the record, I object. There has been no denial to any of these particular matters. I take it, it is truthful.

THE COURT: Well, overruled.

[212] A. At the Carry Out, Mr. Adkins was confronted with the statement of entry and announcing of the robbery, and theft of the liquor. Mr. Adkins denied this, and stated that he, in fact, picked up the liquor, and Mr. Counts is the one that had the shotgun, and an-

nounced the robbery, and announced to put the money in the paper bag, as indicated. We proceeded, then, as far as the area of the store, the parties in the store, and again the leaving of the store, and taking Mr. Flowers, the attendant, was not denied. Mr. Adkins indicated that Mr. Flowers was taken against his will. Now, one involved as much as the other, as far as he was concerned. Proceeded to the car, no denial on who drove the car. No denial on who drove the car to the scene. Mr. Adkins said the car statement was correct, that he did drive the car. He did deny, putting Mr. Flowers, the attendant, into the front seat of the car, for the entire drive. Mr. Adkins indicated he first placed him into the front of the car, between the driver and the passenger, forced him down over the console. Mr. Counts indicated, however, during the trip, he was then placed in the back seat of the car. There was actually no denial about travel of the route. The question concerning personal effects of the victim, Mr. Adkins indicated that Mr. Counts, in fact, is the one that demanded the victim's personal effects, which included his wristwatch, rings, and pocketbook, and so forth. There was no denial on the fact, by either one of them, at that time, about each handling the money, and so forth, back and forth. As far as going to the location, it was somewhat vague, described as over back roads, and so forth. That corresponds with Mr. Counts' statement about going down Duvall Road and making a turn, and coming back. There [213] was a denial of, however when the car was stopped, that Mr. Counts was the driver, Mr. Adkins indicated Mr. Counts took the victim, Mr. Flowers, from the car, with the shotgun, and took him down over the embankment. He said he heard a shot, and then he returned to the car shortly. Thereafter, back to the driver of the car part, and then departed, with no denial about—by either one, where they went. They went back out to Winchester

Road, north on Winchester Road. Questioned about the statement Mr. Counts made concerning the disposal of the personal effects, and the weapon, Mr. Adkins indicated Mr. Counts was the one that had disposed of the items, and there was no denial that they went to Columbus, to 273 Leesburg West. Indicated during the time covering the drive, Mr. Counts indicated that he had to shoot the victim in the side of the head. Continued on to the Leesburg West address. Arrived, as about stated. No denial on the part of Mr. Adkins taking a shower, or no denial on the part of their being there for a period of time. Basically, the rest of the statement, at that point, was the same, as far as the activity that led up until the time of the arrest.

Q. Did they talk about any conversations that occurred between the Village Carry Out, and the murder scene?

A. They agreed on part of it.

Q. O.K., did they agree what conversation took place, between the Village Carry Out, and on the way to the murder scene?

A. As I indicated before, there again he contradicted the statement made by Mr. Counts earlier. When I asked him about the fact he indicated he might have to waste someone, Mr. Adkins indicated Mr. Counts made that [214] statement.

Q. All right, now that statement was made, though, on the way to the Village Carry Out?

A. Between the Cheadle residence, and the Village Carry Out.

Q. How about the Village Carry Out, and Duvall Road? Were there any statements made there, by Mr. Flowers, saying anything?

A. There was agreement that Mr. Flowers was begging for his life. He stated, he had a family, please don't hurt me, please don't kill me. You can have anything

you want, don't hurt me. This was pretty well agreed upon, by both individuals, Mr. Counts and Mr. Adkins.

Q. At the end of that statement, what happened next?

A. At the end of that statement, we arranged to return each of the individuals. Of course, Mr. Counts denied it. He alleged the statement he made was, in fact, true. So, we arranged to have them returned to their respective locations, in the Pickaway County Jail.